lost by virtue of the judgment having been obtained, then it must follow that the lien is extinguished or discharged by such judgment in the same action instituted to enforce it. Such a conclusion in my view is a *non sequitur.*

For all these reasons which I have given I decline, with respect, to follow the decision of Mocatta, J. in *The Alletta (supra).* In the result, this application is dismissed with costs.

Application dismissed.

Solicitors: *Selvadurai Pala Krishnan & Partners, L. Pereira & Netto; V.K.S. Narayanan.*

MALAYSIAN REPORTS

CHEOW SIONG CHIN v. MENTERI DALAM NEGERI, MALAYSIA & ORS.

[S.C. (Salleh Abas L.P., Mohamed Azmi & Abdoolcader S.C. JJ.) March 26 & 28, 1985]

[Kuala Lumpur – Supreme Court Criminal Appeal No. 48 of 1984]

Criminal Law and Procedure – Habeas Corpus – Whether applicable where person has been restrained under Restrictive Residence Enactment (F.M.S. Cap. 39), ss. 2 & 2A – Criminal Procedure Code (F.M.S. Cap. 6), s.365.

Administrative Law – Habeas Corpus – Person restrained under Restricted Residence Enactment (F.M.S. Cap. 39) – Whether order can be challenged – Whether other remedies available.

In this case orders had been made under the Restrictive Residence Enactment (a) requiring the appellant to reside in the town of Gua Musang in Kelantan for a period of three years from the date of the order and (b) directing him to be placed under police supervision for the same period. The appellant applied for a writ of *habeas corpus* to challenge the orders made against him. The application was dismissed in the High Court and the appellant appealed.

Held: the restraint imposed by reason of an order of restricted residence under the Restricted Residence Enactment does not constitute detention of such a nature as to attract the application of the writ of *habeas corpus.* The writ of *habeas corpus* is therefore not available to the appellant in the circumstances.

[*Editorial Note:* In this case the Supreme Court suggested for urgent consideration the repeal by Parliament of section 365 and such of its concomitant provisions in Chapter XXXVI of the Criminal Procedure Code as have been rendered redundant as a result of the introduction of R.H.C. 1980, O.54 which provides for applications for *habeas corpus*].

Cases referred to:

(1) *Reg.* v. *Coleshill Justices, exparte Davies* [1971] 1 W.L.R. 1684, 1686.
(2) *Re Onkar Shrian* [1970] 1 M.L.J. 28.
(3) *Re Isbell* [1930] S.C.R. 62, 65.
(4) *Masella* v. *Langlais* [1955] S.C.R. 263, 271.
(5) *Barnado* v. *Ford* [1892] A.C. 326.
(6) *Ex parte Mwenya* [1960] 1 Q.B. 241.
(7) *Ismail and Anor.* v. *State of Orissa* A.I.R. 1951 Orissa 86, 89.
(8) *Reg.* v. *Secretary of State for the Home Department, ex parte Mughal* [1973] 1 W.L.R. 1133.
(9) *Reg.* v. *Secretary of State for the Home Department, ex parte Phansopkar* [1976] Q.B. 606.
(10) *Reg.* v. *Secretary of State for Foreign Affairs, ex parte Greenberg* [1947] 2 All E.R. 550.
(11) *Bird* v. *Jones* (1845) 7 Q.B. 742; 115 E.R. 668;

(12) *Syed Mahamad Yusuf-Ud-din* v. *Secretary of State for India* (1903) 19 T.L.R. 496; 30 I.A. 154.
(13) *Hazoor Ara Begam* v. *Deputy Commissioner, Gonda* A.I.R. 1934 Oudh 301.
(14) *Bimla Devi* v. *Chaturvedi & Ors.* A.I.R. 1953 All. 613.
(15) *Wales* v. *Whitney* (1885) 114 U.S. 564.
(16) *Rex* v. *Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry* [1917] 1 K.B. 922, 930.
(17) *Mersing Omnibus Co. Sdn. Bhd.* v. *Minister of Labour and Manpower & Anor.* [1983] 2 M.L.J. 54.
(18) *Haley* v. *Commissioner for Corrective Services* [1975] 1 N.S.W.L.R. 118.
(19) *Rex* v. *Denison, ex parte Nagale* [1916] 85 L.J. K.B. 1744.
(20) *Ronnfeldt* v. *Phillips & Ors.* (1918) 35 T.L.R. 46.

SUPREME COURT.

Karpal Singh (*Low Chin Kiat* with him) for the appellant.

Mohamad Noor bin Haji Ahmad (Senior Federal Counsel) for the respondents.

Cur. Adv. Vult.

Abdoolcader S.C.J. (delivering the Judgment of the Court): The primary issue for determination in this appeal is the question whether a quantitative restraint of the liberty of an individual by way of his confinement within a given perimeter can attract the constitutional writ of *habeas corpus.*

The brief facts of this matter are that the appellant was arrested under an order made on June 21, 1984 by the Deputy Minister of Home Affairs under the Restricted Residence Enactment (F.M.S. Cap. 39) ('the Enactment') and detained initially in police custody and then in prison. The grounds of his detention were that as a registered dealer in commodity trading he had in 1983 cheated the public by giving false promises and making false declarations as a result of which many investors sustained considerable financial loss. Representations were made by and on his behalf against this order but to no avail and on August 27, 1984 the Deputy Minister made another order under section 2(ii) of the Enactment requiring the appellant to reside in the town of Gua Musang in Kelantan for a period of three years from the date of the order, and also a further order under section 2A(i) of the Enactment directing him to be placed under police supervision for the same period. These two orders were served on the appellant at Pudu Prison on September 3, 1984 and he was then taken to Gua Musang pursuant thereto.

The appellant took out a motion under section 365 of the Criminal Procedure Code on September 28, 1984 for a writ of *habeas corpus* to challenge the orders made under the Enactment on the grounds that the allegations against him were false, no enquiry had been held before the orders were made and that in any event the provisions of the Enactment were not applicable to the circumstances of his case. At the outset of the hearing Senior Federal Counsel appearing for the respondents raised the preliminary point that the application for *habeas corpus* was misconceived as the applicant was not under detention or in custody. After hearing argument on this point Gunn Chit Tuan, J., on October 26, 1984 upheld the objection taken and dismissed the appellant's application for *habeas corpus, a quo* this appeal emanates.

The question of quantitative restraint such as that posed for consideration in these proceedings should strictly be distinguished from curtailment of freedom in a qualitative context where this relates not so much to confinement within a designated area as to restriction imposed on a person's right to live and to come and go as he pleases, as in the case of a person released from actual physical custody but put on a bail bond, but the underlying principle would appear to be the same in both cases. In *Reg.* v. *Coleshill Justices, Ex parte Davies*[1] it was said (at page 1686) that an application for *habeas corpus* had become academic, as the applicants had in the meantime been released on bail. The Singapore High Court held in *Re Onkar Shrian*[2] that a person at large on bail after his arrest is not entitled to a writ of *habeas corpus* because he was not then detained in custody. It has also been conclusively resolved in several Canadian cases that the writ is only available where the applicant is in actual physical custody, and not when he is on bail, and we need only refer to two decisions of the Supreme Court of Canada, *Re Isbell*[3] (at page 65) and *Masella* v. *Langlais*[4] (at page 271).

In considering whether in relation to restricted residence under the Enactment *habeas corpus* lies, it would be just as well to remember that the application in these proceedings was made under the provisions of section 365(i)(b) of the Criminal Pro-

cedure Code which specifically refer to illegal or improper detention in public or private custody. In *Barnardo* v. *Ford*[5] Lord Watson said (at page 333):

"The remedy of *habeas corpus,* is, in my opinion, intended to facilitate the release of persons actually detained in unlawful custody ... it is the fact of detention, and nothing else, which gives the court its jurisdiction ..."

An involuntary and illegal confinement of the person *in praesenti* is the particular concern of *habeas corpus.* A person kept in police custody or locked up in jail is obviously detained, but there are less obvious situations as in the matter before us where the appellant is restricted in residence to the town of Gua Musang.

There is hardly any authority with regard to this sort of territorial restraint but in *Ex parte Mwenya*[6] where the authorities had ordered the applicant to remain within a certain district of roughly 1,500 square miles, the court left open the question as to whether such an order constituted a 'detention' for the purposes of a *habeas corpus* application since it was agreed by the parties not to argue the propriety of issuing the writ to test such a restraint (at page 245-6, arguendo). The High Court of Orissa held in *Ismail and Anor.* v. *State of Orissa*[7] (at page 89) that a writ of *habeas corpus* will not go against an order of internment (directing restricted residence under statutory provisions basically identical to their equipollent in the Enactment) as this is not 'detention' as ordinarily understood.

In *Reg.* v. *Secretary of State for the Home Department, Ex parte Mughal*[8], the applicant chose, on being refused admission into England, to contest the validity of that refusal by an application for *habeas corpus,* and so he refused to leave the country as he could have done but surrendered to the authorities when he was placed in prison pending the outcome of the *habeas corpus* case. Lord Widgery, C.J. thought (*obiter*) that this was not a case for *habeas corpus* because the applicant was not in custody – there had not been a total deprivation of his freedom. The same reasoning was applied in *Reg.* v. *Secretary of State for the Home Department, Ex parte Phansopkar*[9] and *Reg.* v. *Secretary of State for Foreign Affairs, Ex parte Greenberg*[10].

The reasoning in the cases we have referred to would appear to be directly in line with that in *Bird* v. *Jones*[11], a false imprisonment action in which it was held that partial restriction of freedom of movement is not an imprisonment, where Lord Coleridge, C.J., said (at page 744):

"And I am of the opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or though real, still in the conception only; it may itself be moveable or fixed: but a boundary it must have; and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own."

The Privy Council applied Lord Coleridge, C.J.,'s definition in another false imprisonment case: *Syed Mahamad Yusuf-Ud-Din* v. *Secretary of State for India*[12] where it was held that even though a person on bail is technically in the custody of his surety, he is not 'imprisoned'.

In *Hazoor Ara Begam* v. *Deputy Commissioner, Gonda*[13], the applicant, the Rani of Uttraula, filed an application under section 491 of the Indian Criminal Procedure Code (the equivalent of section 365 of our Criminal Procedure Code) on the ground that the restraint imposed on her to see anybody whom she wished to see was sufficient to entitle her to relief under the equivalent of section 365(i)(b) of our Code. There was absolutely no restriction on the liberty of movement of the Rani. Srivastava, J., without hesitation rejected the argument of the Rani and stated that the words 'restraint' and 'custody' implied physical restraint or confinement. It has also been held that mere surveillance, though not a pleasure, is not detention: *Bimla Devi* v. *Chaturvedi & Ors.*[14].

In an American case, *Wales* v. *Whitney*[15], the Secretary of the Navy of the United States served an order on the Medical Director that he should not leave the city of Washington until further orders. The Medical Director moved for a writ of *habeas corpus* before the Supreme Court of Columbia which dismissed the motion for the reason that the grounds set out by the applicant did not constitute physical restraint at all. On appeal to the Supreme Court of the United States the lower court judgment was affirmed, and Miller, J., delivering the opinion of the court, said: "It is

obvious that the petitioner is under no physical restraint. He walked the streets of Washington with no one to hinder his movements, just as he did before the Secretary's order was served on him." Miller, J., added that "there is no very satisfactory definition to be found in the adjudged cases, of the character of restraint or imprisonment suffered by a party applying for the writ of *habeas corpus* which is necessary to sustain the writ. This can hardly be expected from the variety of restraints for which it is used to give relief ... Obviously the extent and character of the restraint which justifies the writ must vary according to the nature of control which is asserted over the party in whose behalf the writ is prayed".

On a consideration of the authorities we have adumbrated, none of which, except for two, were referred to in the court below or before us, we are of the view that the restraint imposed by reason of an order of restricted residence under the Enactment does not constitute detention of such a nature as to attract the application of the writ of *habeas corpus*. The writ of *habeas corpus* is accordingly not available to the appellant in the circumstances but we would immediately observe consequent to the conclusion we have come to that this denial does not mean that he is without remedy in his quest to challenge the orders made against him or that his right of recourse to the fundamental maxim *'ubi jus ibi remedium'* (there is no wrong without a remedy) is thwarted. On the basis of his claim that his case did not come within the scope, ambit and purview of the Enactment or that an enquiry should have been held before the orders were made, it would be open to him to seek relief by way of an order of *certiorari* or a declaration to this effect. An order of *certiorari* may in appropriate circumstances serve the same purpose as *habeas corpus* [*Rex* v. *Secretary of State for Home Affairs, Ex parte Duke of Chateau Thierry*[16] (at page 930), but for this we would observe that he appears to be out of time unless it is extended under the relevant statutory provisions: *Mersing Omnibus Co. Sdn. Bhd.* v. *Minister of Labour and Manpower & Anor.*[17]], and in *Haley* v. *Commissioner for Corrective Service*[18] it was assumed *sub silentio* that a declaration was available to do the work of *habeas corpus*. In England during the first world war, emergency regulations restricting movement out of or into certain parts of England under the Defence of the Realm Acts, 1914-15 [the precursor to the Emergency Powers (Defence) Act, 1939 enacted during the second world war under which equipollent regulations were promulgated] empowered the making of an order by the competent military authority in prescribed circumstances to prohibit a person from residing in or entering any specified area, and such orders were sought to be assailed, unsuccessfully on the facts and merits of the matter in each case, in *Rex* v. *Denison, Ex parte Nagale*[19] in the Divisional Court of the King's Bench Division by way of writs of prohibition and certiorari, and in *Ronnfeldt* v. *Phillips & Ors.*[20] in the Court of Appeal by way of a declaration that the order was *ultra vires* and void and an injunction to restrain the defendants in that case from preventing him from returning to the area from which he was barred.

We accordingly at the conclusion of argument dismissed this appeal for the reasons we have given.

We would as a footnote suggest for urgent consideration the repeal by Parliament of section 365 and such of its concomitant provisions in Chapter XXXVI of the Criminal Procedure Code as have been rendered redundant as a result of the introduction of Order 54 of the Rules of the High Court, 1980 which provides for applications for *habeas corpus*.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

BOTO' BINTI TAHA v. JAAFAR BIN MUHAMED

[O.C.J. (Salleh Abas C.J. (Malaya)) February 12, 1983]

[Kuala Trengganu – Civil Suit No. 95 of 1981]

Family Law – Malay Customary Law – Claim for share of properties acquired during marriage – Harta sepencarian – Division – Trengganu Administration of Islamic Law Enactment, 1955, s.2.

Malay Customary Law – Harta sepencarian – Division.

In this case the parties were married in 1966. At the time of the marriage the plaintiff-wife worked as a coffee-shop assistant and the defendant-husband carried on a fishmonger business in Dungun. The business of the defendant prospered and during the marriage he bought the matrimonial home, a piece of land, 4 fishing boats, fishing nets and a fish stall. The marriage ended in a divorce in 1974 and on the divorce the defendant only paid the plaintiff her maintenance for the period of *eddah*. The plaintiff applied to High Court for a declaration that she